No. 2593.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. G. NOYES, as Receiver of Washington-Alaska Bank, a Corporation,

Appellant,

vs.

R. C. WOOD, JOHN L. McGINN, RAY BRUMBAUGH, J. A. JESSON, JAMES W. HILL, E. R. PEOPLES, J. A. HEALEY, JOHN A. CLARK and GEORGE PRESTON,

Appellees.

BRIEF OF APPELLEES.

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FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.
San Francisco

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BRIEF OF APPELLEES.

This is a cross appeal, the original appeal being No. 2528 in this Court.

The facts pertinent to this appeal are succinctly set forth in the opinion of the Court below, as follows:

> "It is alleged that the Fairbanks Banking Company was organized as a corporation, under the laws of the State of Nevada, on January 21, 1908, and began business at Fairbanks on March 15,

1908, and continued as such until receivers were appointed to take over its assets and wind up its business on January 5, 1911, the name of the corporation, however, having been changed to that of Washington-Alaska Bank on September 14, 1910. The defendants were officers and directors of the corporation during the time it was carrying on business, and it is by reason of wrongful and negligent acts in their capacity as such officers and directors that the plaintiff seeks to hold them liable in this action.

"The corporation was formed for the purpose of taking over the business of the Fairbanks Banking Company, a copartnership consisting of E. T. Barnette, R. C. Wood and James W. Hill, and the first matter charged in the complaint is on account of an over-valuation of the assets of that partnership, and particularly in respect to two items of such assets, namely, certain shares of stock representing four-fifths of the entire capital stock of the Gold Bar Lumber Company, a corporation organized under the laws of the State of Washington, and doing business in that State, which was taken over by the corporation from the partnership at an agreed valuation of $341,949.00, and which it is charged cost such partnership only $248,067.89, and was at the date of the transfer worth less than that sum, the over-valuation thus being in excess of $93,881.11; and of certain notes then past due, worthless and uncollectible, amounting to $53,287.49. A written agreement was executed by the copartnership and the directors of the corporation on March 16, 1909, reciting the terms and conditions of the transfer of the property, and it is charged that the directors in office at the time unlawfully credited the partnership with, and agreed to pay to said partnership, on December 31, 1909, the sum of $39,642.81, repre-

senting interest accruing on the notes transferred to the corporation from December 31, 1907, to March 15, 1908, which item was not included in the written agreement, and it is charged to have been voluntarily given to the partnership, without any consideration therefor.

"On September 30, 1909, it is charged, the directors purchased the stock of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington, and doing business at Fairbanks, paying therefor the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00); that the amount of such stock was only $150,000.00; and that by reason of such purchase more than $100,000.00 of the assets of the bank were lost. It is charged that on May 12, 1909, the directors purchased one-half of the capital stock of the First National Bank for the sum of $62,500.00, and that at the same time the Washington-Alaska Bank purchased the remaining one-half of the stock of the First National Bank for a like sum; and that subsequently, on May 12, 1910, the officers and directors of the Fairbanks Banking Company sold all the stock of the First National Bank to R. C. Wood and John L. McGinn—that is, the one-half originally purchased, and the other half which it had acquired in the meantime through its purchase of the Washington-Alaska Bank stock—for the sum of $125,000.00, and that by reason thereof the Fairbanks Banking Company sustained a loss of $25,000.00.

"And finally, it is charged that on October 1, 1910, the officers and directors of the Fairbanks Banking Company caused its business and assets to be consolidated and amalgamated with those of the Washington-Alaska Bank, whose stock it then held, and assumed all the liabilities of the Washington-Alaska Bank, which were greatly in excess

of its assets, causing still further injury to the Fairbanks Banking Company.

"It is alleged that the Receiver has taken charge of the assets of the company, and so far as possible reduced them to cash and distributed them among the creditors, but that he has been unable, so far, to pay them only fifty per cent. of the amounts due them, and that after exhausting all the remaining assets and applying them upon the corporation's indebtedness, there will still remain a large sum due to the creditors of the bank.

"The defendants who have appeared by their answers have denied all misconduct and acts of negligence on their part, and have further set up that after the appointment of a receiver, E. T. Barnette and his wife transferred to the receiver, a large amount of property for the purpose of paying all the obligations of the corporation, and that the same was accepted by the receiver, under the order of this Court, in full settlement of any liability on his part; and that inasmuch as he was at all times a director with the answering defendants, and jointly liable with them for any acts of misconduct or negligence, that this transaction operates as a bar to any suit against them; and further, that the receiver has received certain sums of money from the property thus transferred by Barnette and his wife, and that the sums so received exceed the sum for which any answering defendant is liable" (No. 2528, pp. 1202-1206).

This cross-appeal challenges the sufficiency of the findings to support the judgment in certain particulars, and the sufficiency of the evidence to support two of the findings. These last two appear from plaintiff's Assignments of Error, Nos. 1 and 2, and affect the

foregoing transactions which are complained of as constituting unlawful purchases of stock by the directors, viz, the Strandberg stock and the McGinn stock.

As to the Strandberg stock the Court found that it was taken over in partial satisfaction of a pre-existing debt (p. 189).

As to the McGinn stock the Court found that it was purchased by the cashier with money loaned him for that purpose by the bank (p. 190).

As to these two transactions only does the record set forth the evidence. The other questions presented on this appeal all relate to the propriety of the conclusions of law in view of the facts found.

ASSIGNMENT OF ERROR NO. 1—THE STRANDBERG STOCK.

This assignment is founded on the granting of Finding No. 45 for the reason that the same is contrary to the evidence, and is an incomplete finding as to the matter of the surrender of the shares of stock owned by Strandberg Brothers, Emma Strandberg and B. E. Johnson in that it fails to find that at the time the note of Strandberg Brothers was given, the shares of stock of said Strandberg Brothers were accepted by the bank as collateral security therefor (p. 227).

The finding of the Court, No. 45, was as follows:

> "That upon the 18th day of November, 1908, Strandberg Brothers were the owners of 100 shares

of the outstanding capital stock of said Fairbanks Banking Company, Emma Strandberg was the owner of 10 shares, and B. E. Johnson was the owner of 10 shares.

"That said stock was taken in part payment of a loan that the bank had theretofore made to said Strandberg Brothers and said Johnson, who were mining copartners, and the bank also received at said time the further sum of $4,000.00 in cash, which fully paid said loan. That said transaction amounted to the taking of stock for a pre-existing debt, rather than the purchase of stock by the Board of Directors. That said directors believed at said time that said loan was precarious; and said directors, in taking said stock in partial satisfaction of said loan, did so in good faith and for the best interest of the corporation" (p. 189).

The evidence in support of this finding is thus epitomized in the record (p. 215):

"That the substance of the whole of the testimony offered and received on the trial concerning the surrender of said stock of the said Strandberg Brothers, Emma Strandberg and B. E. Johnson was that the said Strandberg Brothers and the said B. E. Johnson were mining copartners and that the said Emma Strandberg was the wife of one of the said Strandbergs, and that on the 5th day of November, 1908, the said Strandberg Brothers were the owners of 100 shares of the capital stock of said bank of the par value of $10,000.00, and the said Emma Strandberg was the owner of 10 shares of said stock of the par value of $1,000.00, and the said B. E. Johnson was the owner of 10 shares of said stock of the par value of $1,000.00, that on the 5th day of November, 1908, it was resolved by the executive committee, the defendant

Hill being present as a member thereof, that a loan of $15,000.00 be made to Strandberg Brothers on the security of their 110 shares of Fairbanks Banking Company stock and notes aggregating $2,500.00, and that thereafter, on November 12, 1908, at a meeting of the Board of Directors at which the defendants, J. A. Jesson, E. R. Peoples and James W. Hill were present, the minutes of the meeting of the executive committee held on said November 5, 1908, were read, and on motion duly made and seconded, were approved, ratified and passed as the action of said board. That pursuant to said proceedings a note in the sum of $17,050.00 payable to said bank, was executed by David Strandberg and Strandberg Brothers & Johnson, dated November 5th, 1908, due May 31, 1909, and the proceeds thereof in the sum of $15,000.00 was placed to the credit of Strandberg Brothers & Johnson in their deposit account, and the said note of $17,050.00 was secured by the said stock of the said Strandberg Brothers and Johnson as collateral.

"That at a meeting of said executive committee held on November 18, 1908, the defendants, J. A. Jesson and James W. Hill being present as members thereof, the matter of taking over the Strandberg Brothers and Johnson stock was discussed, and the minutes thereof further reciting that 'In taking over this stock the proceeds were to apply to the taking up of the loan of Strandberg Brothers to the bank. It was moved by Ryan, seconded by Jonas, that Mr. J. A. Jesson take up the stock of Strandberg Brothers and Johnson at par on behalf of the bank. Motion carried.' That at a meeting of the Board of Directors held on December 12, 1908, at which the defendants James W. Hill, E. R. Peoples and J. A. Jesson were present as members thereof, the minutes of said meeting of the executive committee held on said

November 18, 1908, were read, and on motion duly made and seconded were approved, ratified and passed as the action of the board.

"That on November 19, 1908, said note was cancelled and surrendered to the makers thereof, and said bank took up and cancelled the said stock of the said Strandberg Brothers and the said B. E. Johnson, aggregating $11,000.00 as aforesaid, and in addition thereto received from said Strandberg Brothers and Johnson the sum of $4,000.00 in cash. Said stock was charged to the account of treasury stock and the deposit account of Strandberg Brothers & Johnson was credited $15,000.00 and subsequently the same was withdrawn by them. Afterwards, on November 25, 1908, the deposit account of Emma Strandberg was credited $1,000.00, being the par value of her said stock, and her 10 shares of stock cancelled and charged to treasury stock, and the amount so credited to her account was by her subsequently, to wit, on February 16, 1909, drawn out by her. *That said Board of Directors believed, at the time said stock was taken up, that said loan was precarious, and said directors in taking said stock in partial satisfaction of said loan did so in good faith and in the belief that it was for the best interest of said corporation.* That in order to get the said Strandberg Brothers & Johnson to take up said note and make said cash payment as aforesaid, it was necessary to include in said settlement the said stock of the said Emma Strandberg."

The Court below discussed this evidence in the following language:

"It appears that on November 18, 1908, 10,000 shares of stock belonging to Strandberg Brothers, 1,000 belonging to Emma Strandberg, and 1,000

belonging to B. E. Johnson, a partner of Strandberg Brothers, were taken in part payment of a loan, the bank also receiving at that time from these parties the sum of $4,000.00 in cash, making full payment of the loan.

"While this loan was made only a short time before, and the shares of stock mentioned were taken as part security for the loan, it cannot be said from the evidence that such a change had not taken place in the condition of the debtors within that time as to make this transaction for the best interests of the bank, and that the transaction amounted to a taking of stock for a pre-existing debt, rather than, as contended by the plaintiff, that the whole transaction amounted to a purchase of stock by the directors. Undoubtedly, if a loan were made to a stockholder, and some time afterward he found that he was unable to pay the loan, the directors would have been fully justified, under all authorities, in taking his stock in satisfaction of the loan; and the fact that only a few days elapsed between the loaning of the money and the calling of the loan is not sufficient to show bad faith in the directors, nor that they contemplated purchasing the stock at the time the loan was made (No. 2528, pp. 1225-1226.)

The appellant complains of Finding No. 45, because "It fails to find that at the time the said note of "the said Strandberg Brothers was given the shares "of the stock of said Strandberg Brothers were ac- "cepted by the bank as collateral security therefor" (p. 218).

The finding as contended for by the cross-appellant would certainly have been improper. There was no cause of action stated against any of the

defendants for wrongful or negligent conduct in making any loan. They were not called upon to offer any evidence in defense of the original making of the loan. The only question which could properly be raised was as to the retaking of the stock.

The undisputed evidence is that the *"Board of Directors believed at the time said stock was taken up that said loan was precarious, and said directors in taking said stock in partial satisfaction of said loan did so in good faith and in the belief that it was for the best interest of said corporation"* (p. 216).

This loan was made by the executive committee on November 5th, 1908, the note was dated November 5th, 1908; presumably the money was advanced on that date, notwithstanding that the resolution of the executive committee was not approved by the Board of Directors until November 12th. The note was cancelled and stock taken back on November 18th, making it two weeks between the original loan and the cancellation instead of seven days, as intimated by appellant at page 65 of his brief. Not that this is very material, except as indicating the wrong inference that can be drawn from testimony if there is a disposition so to do.

It appears that when the original note was made, the note of Strandberg Brothers was given for $17,050, but the proceeds of the note came to $15,000.00. There is nothing in the record to explain this discrep-

ancy. Why was this wide margin between the face of the note and the proceeds of it? Probably if this explanation were forthcoming it might establish the wisdom of the board in making the original loan, but as above stated appellees were not called upon to go into the circumstances of the original loan, or make any justification thereof, or defend its legality, because the original making of the loan was not attacked. The case finds the loan in force, its validity unchallenged, and no burden imposed upon the defendants to justify any of their acts in connection with it, until the occasion of the surrender of the stock and the cancellation of the loan.

The evidence is somewhat indefinite as to how the whole transaction was put through the books of the bank. After the loan had been made and the note accepted, it must have been that the account of Strandberg Brothers was credited with the $15,000 advanced on their note, and the bills receivable account debited with $15,000, the amount of the note which the bank held. On the surrender of the stock the bills receivable account must have been credited with $11,000.00, and treasury stock account charged with $11,000.00. At the same time the bills receivable account must have been credited with $4000.00 cash, which was received, and the cash account charged with that $4000.00. What may have happened to Strandberg Brothers in the interval between the making of the loan and the taking back of the stock,

the record does not show. It is quite conceivable that within that interval their affairs may have so altered that the bank was lucky to get anything on the note. If the note of Strandberg Brothers had become worthless, and the $2500.00 of original collateral notes had likewise become worthless, the board of directors would be warranted in going to the extreme limit in order to secure the $3000.00 or $4000.00 cash, and thereby save that much to the bank.

There is one statement in the evidence which is evidently a mistake: "The stocks were charged to the treasury account, and the deposit account of Strandberg and Johnson was credited with $15,000.00, which was subsequently withdrawn by them." As the whole transaction was for the purpose of cancelling the Strandberg note, it is evident that when the amount was credited to their deposit account, the deposit account must also have been charged with the amount in payment of the outstanding note. Counsel says (p. 70 of his brief), "Regardless, however, of the good faith of the directors or the question of preexisting indebtedness, the fact remains as found by the court in Finding 52 that the taking back of this stock was illegal, wrongful and in violation of the laws of the State of Nevada, under which said corporation was organized." We submit that a fair reading of the findings will show that this Finding 52 does not refer to this transaction.

The corporation was a Nevada corporation. If

anything in the Nevada law forbade the bank to make the original loan on the faith of the security of its own stock, the Nevada law should have been pleaded and proved.

We have fully discussed this question in our brief on the appeal in No. 2528, and we respectfully refer the Court to that brief for a discussion of the following propositions, all pertinent to this assignment of error.

The purchase of the stock was not in violation of the general law (No. 2528, p. 80).

The purchase of the stock was not in violation of the law of Nevada (No. 2528, p. 84).

The plaintiff must plead and prove any law of Nevada upon which he intends to reply (No. 2528, p. 72).

The receiver must allege and show that he represents creditors who were such at the time the stock was purchased (No. 2528, p. 149).

The power of a corporation to take its own stock in payment of an indebtedness owing to it is generally recognized even in jurisdictions which deny that such power impliedly exists or where the statutes contain a prohibition against so doing.

7 Ruling Case Law, 533;

Schulte v. *Boulevard Gardens Land Co.,* 164 Cal., 464, 44 L. R. A. N. S., 156;

Crandall v. *Lincoln,* 52 Conn., 73, 52 Am. Rep., 560;

Coppin v. *Greenlees Co.,* 38 Oh. St., 275, 43 Am. Rep., 425.

And in *A. & E.*, Encyc. Law., 2d Ed., p. 821, the rule is thus stated:

> "In those jurisdictions in which it is held that a corporation has no power to purchase its own shares a corporation could not take its own shares in payment of a debt unless such transaction were reasonably necessary to prevent loss. In all jurisdictions, however, a ocrporation may take its own shares in payment of a debt due to it from a stockholder to avoid loss."

In the case of *Barto* v. *Nix*, 46 Pac., 1033, the facts were:

> "In 1890 the Bank of Puyallup was organized under the laws of the State with a capital stock of $100,000 divided into 1,000 shares of $100 each. This stock was all subscribed for, and 60 per cent. paid thereon before any business was transacted. A. Campbell was the owner of 200 shares of this stock, and on the 13th day of November, 1891, he transferred 199 shares directly to the bank, and received a credit of $14,000 therefor on the books of the bank, to which he was then indebted; and the bank thereupon attempted to cancel these certificates of stock."

The Court said:

> "The appellants earnestly contend that, under our statute, the bank had no authority to take the stock of Campbell in payment of his indebtedness to the bank. It may be conceded that a corporation in this State cannot traffic in its own stock. Such we believe to be the rule established in all the States having similar statutory provisions. But it does not follow that it may not receive such

stock in payment of the indebtedness of one of its stockholders when such transaction is bona fide, and for the purpose of protecting the corporation from loss. In our opinion, the transaction between the bank and Campbell was authorized, and thereby the bank became the owner of the stock in question, and had the right to reissue it."

In general a banking, or other corporation, may take its own stock to secure or cancel debt already incurred, regardless of whether prohibited by statute.

Zane on Banks and Banking, p. 189, Sec. 119;
German Savings Bnk. v. *Wulfekuhler,* 19 Kan., 60;
Taylor v. *Miami Ex. Co.,* 6 O., 177;
Dalzelle v. *Commercial Bank,* 82 Mo. App., 264;
Chillicothe Branch of State Bank v. *Fox,* Fed. Cases, No. 2683;
Dock v. *Schlichter-Jute Cordage Co.,* 167 Pa., 370, 31 Atl., 656;
Colburn v. *Oberlin Bldg. & L. Assn.,* 35 O. St., 258.

And in *Taylor* v. *Miami Exporting Co.,* 6 Ohio, 177, it was held that a corporation may do so although the stockholder be solvent at the time.

In *City Bank* v. *Bruce,* 17 N. Y., 507, involving a transaction governed by the laws of Ohio, the Court held that the action of the plaintiff corporation in permitting its stockholders, who were indebted to it

on their stock notes, to pay such notes by the surrender of their shares of stock, violated no rule of the common law or of the statutory law of Ohio. In so holding it cited *Taylor* v. *Miami Exporting Co.*, 6 Ohio, 177, saying that that case held that a bank might receive its own stock in payment of a debt.

ASSIGNMENTS OF ERROR NOS. 2 AND 10—THE MCGINN STOCK.

Appellant claimed that Finding No. 49 was contrary to the evidence and incomplete as failing to find that the cashier became the agent of the bank in borrowing the money to take up the stock and in taking up the stock (p. 218).

Assignment of Error No. 10 was on the ground that the conclusion of law did not follow the finding (p. 220).

The finding of the Court was:

> "That a short time prior to the 13th day of October, 1910, John L. McGinn, as a stockholder of the Washington-Alaska Bank, formerly the Fairbanks Banking Company, demanded the right to inspect its books and papers, and threatened that unless this right was granted him immediately, to make application for an order permitting him to do so and for the appointment of a receiver of the said Washington-Alaska Bank. That the directors of the Washington-Alaska Bank, fearing that information obtained by such an investigation would be used by said McGinn in promoting the interests of the First National Bank in its business, and that

if such information was refused and any litigation was started it would impair public confidence in the Washington-Alaska Bank, and perhaps start a run of its customers and depositors on said bank, acting under this belief, authorized the cashier to loan a purchaser sufficient funds to pay for the stock of said McGinn; one of the directors stating at said time that he had a purchaser who would be willing to purchase said stock for the sum of $6,000.00 but it would be necessary for him to borrow money to complete said purchase; that, as the matter was urgent and the purchaser was not immediately available, the cashier purchased the stock in his own name and gave his note to the bank for the amount thereof and paid to said John L. McGinn the sum of $6000 for his 100 shares of capital stock. That thereafter, and on or about the 25th day of October, 1910, said cashier, without the knowledge of any of the directors, cancelled his note and charged the amount thereof to the bank, and surrendered his stock to the bank, and the stock was thereafter held, with other treasury stock of the company" (pp. 190-191).

The substance of the testimony in support of this finding was as follows:

"That, at the time when the defendants George Preston, J. A. Healey, and John A. Clark were directors of the said Washington-Alaska Bank and about the month of October, 1910, and prior to the twelfth day of said month, John L. McGinn, who had theretofore been a director of said Washington-Alaska Bank, formerly Fairbanks Banking Company, and who had for a number of years been attorney for said bank, and was the owner of 100 shares of the capital stock thereof, notified the vice-president and manager of said bank, J. Albert

Jackson, that he intended to exercise his rights as a stockholder to examine all the affairs of said bank and would do so, and further stated that he would sell his stock for the sum of $6000.00. That the stock of said John L. McGinn was of the par value of $10,000.00; that he had received $2,000.00 in dividends and that he was willing to sell said stock for the sum of $6000.00; that he was one of the owners of the First National Bank of Fairbanks, having recently acquired that property, and that he needed all the money he could get; and that, as the First National Bank was a rival bank of the Washington-Alaska Bank, he did not desire to have any stock in the said Washington-Alaska Bank.

"That an intense rivalry existed between said banks at said time, and there was keen competition in the purchase of gold-dust and the acquiring of banking business, and said John L. McGinn notified said J. Albert Jackson, vice-president and manager of the Washington-Alaska Bank, that he would exercise his right as a stockholder to demand an inspection of the books of said Washington-Alaska Bank and other records, thus enabling him to secure information respecting the clients, customers, creditors and debtors of the said Washington-Alaska Bank that could be by him used to the advantage of said First National Bank and greatly to the detriment of said Washington-Alaska Bank.

"That said demand and said statements were by said J. Albert Jackson reported to the Board of Directors or the greater part thereof, and an informal discussion was had by a number of said directors as to what was advisable to be done; that it was also reported by said vice-president and manager, J. Albert Jackson, that said McGinn had threatened that if his demand for an inspection of

the books and records of said bank was not complied with he would bring a suit against the said Washington-Alaska Bank as a stockholder thereof, asking for the appointment of a receiver, on the ground that, as a stockholder he was refused information that he was entitled to receive, and on the further ground that the officers of said Washington-Alaska Bank were mismanaging said bank; in that they were paying more for gold-dust than they were justified in paying, and for other acts.

"That D. H. Jonas, one of the directors of said bank, stated to the directors, including said defendants, that he was satisfied that he could find a purchaser for said stock at the said price of $6,000.00; that thereafter and on the 12th day of October, 1910, at the regular monthly meeting of the directors of the Washington-Alaska Bank, the matter was considered by the board of directors and it was then reported by said D. H. Jonas that he had not been able to see the prospective purchaser, but that he was satisfied that said prospective purchaser would take said stock and would probably require a loan from the bank, as he did not at that time have sufficient money to make said purchase; that it was again reported by the vice-president and manager that said John L. McGinn was insistent on said matter and demanded that it be closed at once.

"That at said meeting of 12th October, 1910, it was moved, seconded and duly carried that 'The officers extend a loan to the party to whom McGinn would sell and retain the stock in the bank as collateral.' That it was reported at the said meeting by said D. H. Jonas that it might be some days before the prospective purchaser could be reached, and it was then decided by said Board of Directors, that, if it became necessary to prevent action being taken by said John L. Mc-

Ginn, F. W. Hawkins, the cashier of said bank, be loaned the money necessary to pay for the stock, to wit, the sum of $6,000.00, and that said stock be held as collateral security for said loan, and that, when the prospective purchaser could be communicated with, a new loan could be made to said purchaser and the stock be issued to said purchaser and be held by the bank as collateral security for such new loan.

"That, in accordance with said agreement, said F. W. Hawkins borrowed from the said bank the sum of $6,000.00 which he paid to said John L. McGinn for said stock and said stock was assigned by the said McGinn in blank and said F. W. Hawkins executed his note to said bank for said sum.

"That thereafter, and without the knowledge, consent or approval of the Board of Directors, or of said directors as members of said board, said F. W. Hawkins cancelled his note and returned said stock to the bank, and said defendants knew nothing of said transaction until after said bank was closed.

"That the directors of said Washington-Alaska Bank had with them employees whom they trusted and who were under bond, and who had theretofore, so far as said defendants had knowledge or information, strictly performed the orders given to them by the Board of Directors; that the Board of Directors had no information concerning the subsequent action of said F. W. Hawkins with regard to said stock until after the suspension of said Washington-Alaska Bank.

"That said directors refused in behalf of said bank to purchase said stock from said John L. McGinn, and did not purchase said stock, and the surrender of said note by said F. W. Hawkins was wrongful and without authority.

"That no information was furnished to said board of directors that would lead them to believe that the officers of said bank had done or performed any act or thing contrary to the instructions given, and said defendants were never informed that the purchaser whom said D. H. Jonas claimed to be available had not purchased said stock.

"That at the time it was voted to loan said money to the purchaser of said stock, said stock was considered by said Board of Directors to be worth a sum in excess of $6,000.00 and said loan was considered a perfectly safe loan, and said directors had no reason to believe that said bank was not in a perfectly solvent condition or that the McGinn stock was not worth the full sum of $6,000.00.

"That had said McGinn been permitted the rights claimed by him as a stockholder and examined into the affairs of said bank, with a view of ascertaining its clients, customers, creditors and debtors, it would have caused said bank great and irreparable damage and would have resulted to the benefit and advantage of the First National Bank, of which said John L. McGinn was one of the principal owners" (pp. 209-214).

The opinion of the Court discussed this portion of the case in the following language:

"A more difficult question is presented by the transaction resulting in the purchase of the stock of McGinn on October 25, 1910. The defendants' answer alleges, and the evidence tended to show, that at this time McGinn was interested in the First National Bank of Fairbanks, and that competition between it and the Fairbanks Banking Company was very keen; that as a stockholder of the Fairbanks Banking Company he demanded the right to inspect its books and papers, and threat-

ened, in case this right was not granted him immediately, to make application to Court for an order permitting him to do so, and also for a receiver; that the directors of the Fairbanks Banking Company feared that information obtained by such inspection would be used by him in promoting the interests of its rival in business, and that any litigation started would impair public confidence in the bank; and perhaps start a run of its depositors on the bank; and that, acting under this belief, they authorized their cashier to loan a purchaser of the stock sufficient funds to pay for the same; that the cashier purchased the stock in his own name, and gave his note to the bank for the amount thereof, and paid McGinn the sum of $6,000.00 for his 100 shares of stock; and that soon thereafter the cashier, without the knowledge of any of the directors, cancelled his note, and charged the amount thereof to the bank, and that the stock was thereafter held with the other treasury stock of the company. It can scarcely be said that, in view of all these circumstances, the directors were utterly unjustified in purchasing the stock for the bank, if it should be held that the transaction did amount to a purchase by the bank directly, while if the directors really contemplated loaning funds to another for the purchase of the stock, and only authorized such loan, but not a purchase by the bank itself; and the cashier, being a person in whom they had the right to place confidence, thereafter violated their instructions, and without their knowledge, used the funds of the bank to reimburse himself for the purchase of the stock made, then clearly the directors would not be liable therefor, in the absence of direct knowledge of such transaction" (pp. 1226-1227 of No. 2528).

Three propositions are presented here:

1. Did the directors have the right to purchase this stock at all, either under the general law or under the law of Nevada?

This is discussed in our brief in No. 2528 at page 80 *et seq.* to which we respectfully refer.

2. The transaction was not a purchase by the bank, but a loan to Hawkins, the cashier.

The evidence was unequivocal and undisputed on this point.

> "That said directors refused in behalf of said bank to purchase said stock from said John L. McGinn and did not purchase said stock" (p. 213).

3. If it was a direct purchase by the bank, the purpose was to protect the bank and the directors were justified in buying the stock.

In regard to the purchase of this stock, the directors were confronted with a situation such that they, in the exercise of their judgment, felt that the interests of the bank would be damaged if they permitted stockholder McGinn an inspection of their books, records and papers. He was connected with the First National Bank, which was a rival bank and there had been a bitter fight on between the two banks, during the season that was then about to close. They felt that if an inspection was permitted by said McGinn

the bank would be greatly injured thereby. This called for an exercise of their judgment, for which they could not be held liable.

Thompson on Corporations, Vol. 2, Sec. 1271.

If they did not permit an inspection of the books and permit the bank to be injured, they then honestly believed that an action would be instituted by the disgruntled stockholder to enforce his rights as a stockholder, and probably for the appointment of a receiver, alleging mismanagement. It is only reasonable to suppose that the directors, knowing the conditions that prevailed in Alaska, realized from past experiences that the least whisper or suggestion of mismanagement, however wrongful or untrue the same might be, would immediately precipitate a run on the bank. This would necessarily close its doors, as no bank has sufficient funds always available from which to pay the demand deposits; and there were no other banks from which assistance could be secured. In the event such a run was started, it was certain that the bank would be wrecked. The directors could not be held liable if such a belief was a mistake of judgment. Such belief, however, was absolutely justified by the circumstances and conditions that prevailed in this case. A stockholder is not required to give bond for any damage that may result by reason of the wrongful bringing of an action against a bank and would have been exempt from any liability for

wrongful or false charges or misstatements contained in his complaint, as at that time there was no law in Alaska relating to the circulation of false reports concerning a bank. Consequently, the directors were compelled to take some effective action. From the testimony it stands uncontradicted that the directors had no reason to believe the bank was not in a perfectly solvent condition (p. 214). The directors were then confronted with a condition that must be met immediately. They had a right to rely upon the statement of one of their number, who had been a director from the inception of the bank, that he had a purchaser for said stock, especially when it was offered at $4,000 less than par, and they voted to extend a loan to the purchaser for the purpose of purchasing the stock and to hold said stock as collateral. The directors are not charged with making a bad loan. They had a perfect right to accept the stock as collateral. No contention has been made that they acted in bad faith. Until the purchaser could be secured, a temporary arrangement must be made, in order to secure the money. The bank having refused absolutely to purchase the stock, the money was loaned to F. W. Hawkins, who gave his note therefor. The uncontradicted evidence shows that without the knowledge of the directors said Hawkins canceled the note and surrendered the stock into the treasury. The Court cannot presume that the directors intended the transaction as a purchase of the stock and the loan of

the money to the cashier as a mere subterfuge, when the evidence conclusively and undisputedly shows that was not the intention, and there is no evidence to show any bad faith on the part of any of the directors. There was a breach of duty on the part of the cashier, and had it been reported to the directors, they might still have been able to secure a purchaser if the one in view did not take the stock. There is nothing in the record to show that the directors did anything except what they considered for the very best interests of the bank, and all that was done was for the purpose of protecting the interests of the stockholders and all of the creditors of the bank.

Directors of a corporation are justified in purchasing its stock for the corporation where the object is to protect the company by getting rid of a stockholder whose acts are detrimental to its interests.

A well considered case is the case of *Copper Belle Mining Co.* v. *Costello,* 95 Pac., 94, in which it was held that:

> "A purchase by a mining corporation of its own stock is valid, as against the corporation, where made in the discretion of the officers of the corporation, in good faith, and in the exercise of their control of the affairs of the corporation, for the purpose of getting rid of a superintendent whose management was believed to be injurious, and where it does not appear that at the time of pur-

chase the corporation was insolvent, or that any of its officers or stockholders had reason so to believe."

Although the English decisions are uniformly against the purchase of its own stock by a corporation, they permit an exception to their rule for the purpose of securing harmony and adjusting differences between stockholders and officers of the bank.

In the case of *In re Dronfield Silkstone Coal Co.*, L. R., 17, Chancery Div., 76, 50 L. J. Ch., N. S., 347, differences had arisen between the company and one of its directors as to the mode of conducting its business, which resulted in the retirement of the director and purchase by the company of his shares of stock. The by-laws of the corporation contained no clause authorizing the company to purchase its shares of stock, but the articles of association contained a broad provision authorizing the company so to do, and while the Court held that such article could not legally authorize the company to embark in the traffic of its own capital stock, a business not authorized by the law, it validly authorized the company to purchase its own shares under the circumstances arising in this case, as such purchase was not made with the intention of trafficking in its own stock, though profit might incidentally arise in a resale of the shares.

We respectfully submit that under the critical conditions presented by McGinn's act, no action of the board could have been more laudable and no employ-

ment of the bank's funds more legitimate than their use to facilitate the elimination of McGinn and thereby possibly save the very life of the bank itself.

ASSIGNMENT OF ERROR NO. 3—OVER-VALUATION OF THE GOLD BAR STOCK.

There are other matters included in this assignment, but as they are repeated under succeeding assignments we shall only consider the Gold Bar stock here.

The exception is to the conclusion of law that John A. Jesson, James W. Hill and R. C. Wood are not jointly and severally liable for over-valuation of the Gold Bar stock in the sum of $75,000.00, that this conclusion is contrary to the evidence, contrary to the facts found and contrary to law (p. 218).

The only findings on this subject were:

> "That among the other assets of said partnership so accepted by said officers and directors was four-fifths of the capital stock of the Gold Bar Lumber Company, a corporation existing in the State of Washington, which said stock was accepted and paid for at the valuation of $341,949.00, and said stock was at all times during the existence of said corporation carried as an asset in said sum" (p. 182).

> "That at the time said investment was so made as aforesaid, said Lumber Company was closed down, and immediately prior to closing down, it has been operated at a loss, that in so far as said Lumber Company was able to operate since the purchase of said stock by said corporation, all of

its earnings and a part of its surplus have been expended in the purchase and repair of equipment for said mill, and in the operation of said mill its standing timber was being consumed and its best asset exhausted. That no dividends have ever been paid on the capital stock of said lumber company during the time the same was owned by said bank" (p. 187).

The Court in its opinion said:

"Whatever subsequent events may have shown to be the actual value of the assets taken over, it has not been shown, by the evidence given in this case, that there was any actual fraud in the determination of the value placed upon such assets by the directors in March, 1908. The evidence rather shows that such value was placed upon these assets by the stockholders themselves acting through their committee, and that the resolution of the stockholders of March 12, 1908, authorizing the directors to take over such assets, contemplated only the execution of the formal papers necessary for the transfer, rather than that the directors should exercise their individual judgments in determining the value of such assets" (No. 2528, pp. 1211-1212).

A mere reading of the findings quoted shows that there was no warrant for the conclusion that the Gold Bar stock was over-valued in the sum of $75,000 or any other sum.

ASSIGNMENT OF ERROR NO. 4—PURCHASE OF TANANA ELECTRIC COMPANY NOTES, $27,997.38.

Assignment No. 4 reads in part as follows:

> "The Court erred in denying that portion of Conclusion of Law No. 1, which is as follows:
>
> "'Purchase of Tanana Electric Company notes $27,997.38'" (p. 229).

Appellant claims that this Conclusion of Law is contrary to the facts found.

The transaction relates to the original purchase of the assets of the partnership by the corporation.

The findings were:

> "That of said notes so past due as aforesaid, there were two executed by the Tanana Electric Company in the sum of $27,997.38 which depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said Board of Directors, and said repudiation was known to the members of said board. That said notes are still unpaid, and the same was at all times carried on the books of the said Washington-Alaska Bank, formerly Fairbanks Banking Company, as an asset in the sum of $27,997.38" (p. 181).

> "That said Board of Directors and the officers of said bank accepted said notes of the Tanana Electric Company and paid therefor the sum of $27,997.38, with knowledge on the part of each of

them that the same depended for their value upon said alleged guaranty alone" (p. 182).

These should be considered in connection with the opinion of the Court,

> "Whatever subsequent events may have shown to be the actual value of the assets taken over, it has not been shown, by the evidence given in this case, that there was any actual fraud in the determination of the value placed upon such assets by the directors in March, 1908. The evidence rather shows that such value was placed upon these assets by the stockholders themselves, acting through their committee, and that the resolution of the stockholders of March 12, 1908, authorizing the directors to take over such assets, contemplated only the execution of the formal papers necessary for the transfer, rather than that the directors should exercise their individual judgments in determining the value of such assets" (No. 2528, p. 1211).

On our direct appeal No. 2528, we challenge the findings of court above set out in relation to the Tanana Electric Company notes and to the argument in support of our position there taken we respectfully refer the Court (See Appellant's Brief No. 2528, p. 131).

As the Court states in its opinion, there is no finding of the Court that the purchase of these Tanana notes was in any way tainted with fraud. The transaction was one involving the issue of stock and under the Nevada law the judgment of the directors in the absence of fraud was conclusive upon the corporation.

ASSIGNMENT OF ERROR NO. 5—PURCHASE OF OTHER NOTES PAST DUE FROM THE PARTNERSHIP OF $41,911.56.

Assignment of Error No. 5 is as follows:

> "To the denial of that portion of plaintiff's proposed Conclusions of Law Number 1 which is as follows: 'Purchase of other notes past due, from the partnership of $41,911.56,' plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law" (p. 219).

This also relates to the original acquisition of the assets of the partnership by the corporation.

The findings were:

> "That of the loans and discounts transferred by said partnership to said corporation a large amount were then past due, of which past due paper the sum of $69,908.94 now remains in the hands of the receiver unpaid and uncollectible, which said loans and discounts were accepted by the directors of said corporation at their face value, and the same were included in those on which the accrued interest referred to in said resolution was afterward computed" (p. 181).

> "That of the notes accepted from said partnership as aforesaid and paid for by said corporation, there were charged on December 31, 1907, by said partnership on the books of said partnership to an account known as 'doubtful account' the sum of $22,979.99 and said doubtful account, so including said notes in said amount, was then depreciated on the said books to the amount of thirty-

three and one-third per cent. thereof, which said notes were accepted by said corporation and paid for by them in the amount aforesaid, to wit, $22,-979.99, all of which said notes were then past due, and of which there still remains unpaid and uncollectible the sum of $12,860. That of said notes so charged to said doubtful account as aforesaid, there was on December 31, 1909, charged by said corporation to the account of profit and loss on the books of said corporation the sum of $12,-192.80" (p. 185).

The Court said in this regard:

"While considerations other than the issuing of stock were paid to the partnership, the whole transaction was essentially one involving the issue of stock of the corporation for property, and the law of Nevada, under which the corporation was organized, and by which the liability of the defendants must be determined, provides:

"'Any corporation existing under any law of this State may issue stock for labor done, or personal property, or real estate or leases thereof; in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive.'

"The directors at that time appear to have been acting in good faith, and to have invested considerable sums of their own money in the stock of the corporation, and subsequently to have left, in addition, considerable sums of money on deposit with the new bank. While it may be that the fact that such a large part of the notes taken over were past due should have shown that such paper was an undesirable asset for a bank, there is no evidence that the directors at that time did not honestly believe it to be worth the valuation placed upon it" (No. 2528, pp. 1212-1213).

There was no finding that the notes were not worth their face value at the time they were taken over. They must be presumed to have been so in the absence of a finding to the contrary.

ASSIGNMENTS OF ERROR NOS. 6 AND 7—ACCRUED INTEREST ON PARTNERSHIP NOTES PAID TO BARNETTE, HILL AND WOOD, AND WHICH WAS NOT COLLECTED, $7500.00, AND BALANCE OF ACCRUED INTEREST PAID BARNETTE, HILL AND WOOD ON PARTNERSHIP NOTES PURCHASED, $32,142.81.

Assignments of Error Nos. 6 and 7, are as follows:

"To the denial of that portion of plaintiff's proposed Conclusions of Law Number 1 which is as follows: 'Accrued interest on partnership notes paid to Barnette, Hill and Wood, and which was not collected, $7,500.00,' plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court and contrary to law" (p. 219).

"To the denial of that portion of plaintiff's proposed Conclusions of Law Number 1, which is as follows: 'Balance of accrued interest paid to Barnette, Hill and Wood on partnership notes purchased, $32,142.81,' plaintiff excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law" (p. 219).

The findings were:

VIII.

"That said committee met on the 5th day of January, 1908, and, after investigating the affairs of the bank, made the following report to be presented for the consideration of the proposed new corporation" (p. 174).

"(f) That all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908" (p. 175).

XIV.

"Thereafter, on March 12, 1908, at a meeting of the Board of Directors, said matter was considered by them and the resolutions of the proposed stockholders, set out in Finding VIII hereof, were by said directors adopted and approved, except that the resolution providing for the payment of accrued interest up to February 15, 1908, was by them amended so as to read 'March 15, 1908'" (p. 178).

"XXXVI.

"That on March 23, 1908, pursuant to said resolution of the said Board of Directors adopted on March 12, 1908, the accrued interest on said loans so transferred to said corporation was computed to March 15, 1908, in the sum of $39,642.81, and one-half thereof was placed to the credit of said Bar-

nette, and one-fourth thereof each to the credit of said Hill and Wood on the books of said corporation, and subsequently the same was paid to said Barnette, Hill and Wood in cash."

"XXXVII.

"That of said interest so paid to said Barnette, Hill and Wood as aforesaid, approximately $7500.00 thereof was never collected by said bank" (pp. 185-186).

The opinion of the Court says:

"Whatever may be said of the rights and liabilities of Wood, under the written agreement of March 16, if this were still an executory agreement, it seems that now, the agreement having been fully executed, in accordance with what was then the understanding of all the parties, and cash, in place of stock, delivered to Wood, the receiver is not now in a position to set aside this executed contract, and to enforce the terms of the written contract, although such written contract varies, in some respects, from the one actually carried out by the parties. It would seem that the same reasoning should apply to the item of $39,000.00 interest accruing from December 31, 1907, to March 15, 1908, upon the paper of the partnership transferred to the corporation, and which was paid to Barnette, Hill and Wood by the corporation on December 31, 1908. The minutes of the meeting on January 5, contemplate that interest accruing from December 31, 1907, to February 15, 1908, should be paid to the partnership; and it was also contemplated at that time that the business of the partnership should be taken over by the corpora-

> tion on February 15. It was impossible, however, for the actual transfer to be made until March 15, and in view of all of the transactions between the parties, it seems that their intention was that the accruing interest, after December 31, 1907, until such time as an actual transfer of business should be made, should belong to the partnership rather than the corporation" (No. 2528, pp. 1210-1211).

It should be borne in mind that as far as the defendants Hill and Wood are concerned they were neither of them directors of the corporation at the time when the assets were taken over. They are charged with liability as being officers of the corporation but the mere fact that they were officers would not charge them with liability unless some specific breach of duty on their part was urged and proven.

There is no allegation that there was any fraud or imposition in connection with this transaction and there is no finding that there was any fraud or any conspiracy to defraud the bank. The fact that some of the accrued interest which was paid to Barnette, Hill and Wood was not collected subsequently by the bank, has no bearing on this transaction if it was in fact clear and free from fraud at the time it took place.

ASSIGNMENT OF ERROR NO. 8—SURRENDER OF WOOD'S STOCK $13,000.00.

Assignment of Error No. 8 is as follows:

"To the denial of that portion of plaintiff's proposed Conclusions of Law number one, which is as follows: 'Surrender of Wood's stock, $13,000.00,' plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law" (p. 219).

These are the facts as found:

"That said committee [of the proposed incorporators] met on the 5th day of January, 1908, and, after investigating the affairs of the bank, made the following report to be presented for the consideration of the proposed new corporation (p. 174): . . .

"(g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later than July 1st, 1908" (p. 175).

"That on the 16th day of March, 1908, a written agreement was entered into between said corporation and said partners, and on the same day the same was signed by the said Barnette and Hill, and also on behalf of said bank by its president and secretary, wherein the valuation of the resources of said partnership was fixed at $790,940.31 and its liabilities at $538,940.31, leaving an excess of $252,000.00 belonging to the said Barnette, Hill and Wood, in which said agreement the said Barnette, Hill and Wood agreed to accept stock

of the corporation at its par value for the amount of assets in excess of said liabilities, except that $200,000 thereof should be placed to the credit of the said Barnette as a special deposit with said corporation upon the terms therein stated. By the terms of said agreement the amount of stock to be issued to Barnette, Hill and Wood, was fixed at $52,000.00 instead of $88,000.00 as contemplated by said resolution and subscription, thus entitling Barnette to 260 shares and Wood and Hill each to 130 shares, a copy of said agreement is annexed to plaintiff's complaint and marked 'Exhibit One'" (pp. 178-179).

"That at the time said written agreement was signed and executed, and during all of the negotiations leading up to the making of the same, the defendant Wood was in Seattle, Washington, but he was advised duly concerning the same by the defendant Hill by letter and by telegram" (p. 180).

"That prior to the return of said Wood to Fairbanks, to wit, on the 29th day of February, 1908, he offered to sell his stock in said corporation and to take in payment therefor part cash and a note for the balance, to be secured by said stock as collateral security" (p. 180).

"That the defendant Wood returned to Fairbanks some time in the month of April, 1908, and, upon his return, he signed said written agreement so entered into as aforesaid, knowing that the same contained said clause requiring him to take stock for his share of the assets of said partnership so transferred to said corporation in excess of the liabilities thereof as aforesaid, and also knowing that the same did not provide for the payment of said accrued interest" (p. 181).

"That the said Wood accepted said office of cashier while in the said City of Seattle, and, on the 16th day of March, 1908, entered upon the discharge of his duties as such cashier, and, upon his return to said Fairbanks in April, 1908, as aforesaid, entered actively upon such duties and continued to so act until June 29, 1908, when he tendered his resignation as such cashier, and the same was accepted by the Board of Directors to be effective at the close of business on June 30, 1908, and one B. R. Dusenbury, who was then assistant cashier, was elected to succeed Wood as cashier" (p. 182-183).

"That at the time said Wood tendered his resignation as cashier as aforesaid, he demanded that there be paid to him the amount of his interest in said partnership assets, to wit, $13,000" (p. 183).

"That a certificate for 130 shares of the capital stock of said corporation had been written up in the name of the defendant Wood, of the par value of $13,000, but the same was never detached from the stock book. That said 130 shares were carried on the books of said bank as outstanding stock from March 16, 1908, to June 30, 1908" (p. 183).

"That on the 30th day of June, 1908, with the knowledge, consent, and approval of the officers and directors of said bank a certificate of deposit was issued to and accepted by the said Wood in the sum of $13,000, in lieu of said stock, which said certificate was signed by the said R. B. Dusenbury as assistant cashier prior to when the said resignation of the said Wood, as cashier became effective, and said shares of capital stock were

on the same day charged to treasury stock on the books of said bank" (p. 183).

"That subsequently the said Wood drew out in cash from the funds of said bank the amount of the said certificate of deposit, to wit, $13,000" (p. 183).

As a conclusion of law from these findings the plaintiff proposed the following:

"The defendants John A. Jesson, James W. Hill and R. C. Wood are jointly and severally liable for the following items . . . Surrender of Wood's stock. . . $13,000."

The Court denied this request and plaintiff assigns the ruling as error (p. 229).

The opinion of the Court is as follows:

"Wood was absent from Fairbanks during all of this time, and did not return until about the middle of April, 1908, and it seems that at this time the agreement with the corporation was signed by him, his name having been signed to the stock subscription list on his behalf by Barnette. He testifies that it was distinctly understood between him and the directors at the time he did sign the agreement, that he should have the right to take cash, instead of the par value of the shares subscribed for, on July 1st, and that as evidence of such understanding there was then shown him the report of the committee of January 5th, and the minutes of the corporation, wherein this was set forth. Prior to his returning to Fairbanks, he had performed some acts as cashier of the corporation in Seattle, and he continued to

act as such cashier until June 30th. On June 29th, he tendered his resignation, and on July 1st, was paid $13,000.00, the par value of the stock allotted to him. The certificates for this stock seem never to have been in his possession, but to have remained undetached in the stockbook of the corporation. *Whatever may be said of the rights and liabilities of Wood, under the written agreement of March 16th, if this were still an executory agreement, it seems that now, the agreement having been fully executed, in accordance with what was then the understanding of all the parties, and cash, in place of stock, delivered to Wood, the receiver is not now in a position to set aside this executed contract,* and to enforce the terms of the written contract, although such written contract varies, in some respects, from the one actually carried out by the parties" (No. 2528, pp. 1210-1211).

The legal questions bearing upon the receiver's right to recover the $13,000.00 paid to the defendant Wood are fully discussed in our reply brief in case No. 2594, this being the action brought by the receiver against Wood individually to recover this same $13,000.00.

We respectfully refer the Court to that brief and the authorities cited in support of the following propositions.

1st: That the transaction did not constitute a purchase by the bank of the Wood's stock but was rather a re-taking of stock pursuant to an agreement made at the time of the subscription by Wood, which sub-

scription was conditional, the condition being that he should have the right to take cash in lieu of the stock at any time up to July 1, 1908.

2nd: That the transaction being an executed agreement cannot now be set aside.

3rd: That the receiver must show that he represents creditors who were such at the time the transaction occurred.

ASSIGNMENT OF ERROR NO. 10.

This refers to the McGinn stock already considered under Assignment of Error No. 2.

ASSIGNMENT OF ERROR NO. 11—INTEREST FOR ONE YEAR ON AMOUNT INVESTED IN STOCK OF FIRST NATIONAL BANK AND SOLD TO MCGINN AND WOOD $10,000.00.

The facts found were:

"That in the month of May, 1909, said Fairbanks Banking Company and the Washington-Alaska Bank of Washington, then doing business at Fairbanks, each purchased one-half of the capital stock of the First National Bank of Fairbanks, Alaska, for which each paid the sum of $62,500.00 and continued to own and hold said stock until the month of May, 1910.

"That on or about the 4th of May, 1910, said Fairbanks Banking Company sold the entire capital stock of the said First National Bank to the defendants Wood and McGinn for the sum of $125,000.00 and reecived said amount in payment

therefor, delivering to them the said capital stock of said First National Bank.

"That at the time said banks purchased said stock of the First National Bank, they gave to said Wood an option to purchase the same on or before June 1, 1910, for the sum of $125,000.00, and said sale to said Wood and McGinn was made in pursuance to said option.

"That neither the said Fairbanks Banking Company, nor the said Washington-Alaska Bank of Washington, received any dividend on said stock of the said First National Bank during the time the same was held and owned by them, nor did they, or either of them, receive any interest from the said Wood and McGinn, or from anyone in their behalf, for the money invested in said stock during the time the same was so invested" (pp. 193-194).

Appellant requested the court to find as a conclusion of law from these findings that the defendants J. A. Jesson, R. C. Wood, John L. McGinn and Ray Brumbaugh, are jointly and severally liable for one year's interest upon the amount invested in the stock of the First National Bank and sold to McGinn and Wood (p. 1206).

The Court denied this request and the ruling is assigned as Assignment of Error No 11.

The Court said in its opinion:

"Nor is it apparent from the evidence upon what basis any damages can be claimed against the directors, on account of their transactions with the stock of the First National Bank. This stock was acquired in May, 1909, and at the same time an

option was given to Wood to purchase it at the same price in May, 1910, and it was on this latter date sold to him for this price; so that there was no actual loss from the transaction, except that during this time the funds of the bank were tied up in the stock, and no returns realized therefrom. There was evidence tending to show that it was an advantage to the Fairbanks Banking Company to have control of the First National Bank during this time, as it thus prevented competition in the purchase of gold-dust. There was no evidence as to the earnings of the First National Bank during the time its stock was carried by the Fairbanks Banking Company, nor any evidence that it was worth more at the time that it was sold than at the time when it was purchased; nor any evidence that the option given at the time of the purchase for a resale was illegal or fraudulently entered into by the directors" (No. 2528, pp. 1215-1216).

There is nothing in these findings which is inconsistent with the most complete innocence of any wrong-doing on the part of all concerned. "Fraud is odious and will not be presumed."

There may have been a dozen reasons why the Bank desired to get the First National Bank stock out of the hands in which it was at the time, and into friendly hands, and if Wood and McGinn, or any one else were to take it off the Bank's hands, they would certainly have had to have sufficient time to raise the large sum of money involved and a year was not unreasonable.

During the interim, the bank was spared competi-

tion in the purchase of gold dust and there may have been other considerations influencing it.

It must be borne in mind that there is no claim that the appellees, Wood and McGinn, controlled the bank. There were twelve directors who were in control and there is nothing in the findings to imply the slightest bad faith on the part of any one concerned.

ASSIGNMENTS XII TO XXI.

The remaining assignments go to the points already discussed.

THE DECREE SHOULD BE AFFIRMED ON THE RECORD BEFORE THE COURT.

Under the law of Alaska all issues of fact and actions of an equitable nature may be tried by a court in all such actions. The Court in rendering its decision therein shall set out in writing its findings of fact *upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon* . . . and such findings of fact shall have the same force and effect, and be equally conclusive as a verdict by a jury in an action.

Compiled Laws, Sec. 1204;
Carter Code, Sec. 372.

One of the principal grounds of defense of this action was that the torts complained of had been sat-

isfied and the liability of the defendants released by the release of their joint tort-feasor E. T. Barnette. This issue is plainly presented by the record under the amended answer of defendants, Jesson et al. (p. 114), the answer of defendants Wood, Healey and McGinn (p. 67), and the replies thereto (pp. 157, 162).

There is no finding whatever upon the issue thus presented, notwithstanding the requirement of the Alaska Statute that the court must set out its findings of fact *upon all material issues.* The appellant does not challenge the failure of the court to find upon those issues. Where there is no finding upon the issue, it must be presumed in favor of the judgment that the evidence sustained the decision.

James v. *Williams,* 31 Cal., 211;
Sears v. *Dixon,* 33 Cal., 327;
Shelby v. *Houston,* 38 Cal., 410;
Steinback v. *Krone,* 36 Cal., 303;
Lovell v. *Frost,* 44 Cal., 471;
Smith v. *Cushing,* 41 Cal., 97;
Emmal v. *Webb,* 36 Cal., 197;
More v. *Lott,* 13 Nev., 380;
Warren v. *Quill,* 9 Nev., 264.

ACCORD AND SATISFACTION.

To all the alleged claims herein made the defendants interposed the defense that there had been a satisfaction in whole or in part by reason of an accord and satisfaction between Barnette and the receivers. The question is fully discussed in our brief No. 2528, pp. 155.

We desire, however, to bring to the attention of the Court the following additional authorities bearing upon those questions:

As a person who has received an injury from the wrongful act of others is entitled to receive but one satisfaction therefor it necessarily follows that an accord and satisfaction from one of several joint wrongdoers is a satisfaction as to all.

1 *Corpus Juris.*, 536.

In *Snyder* v. *Witt,* 99 Tenn., 618, it was said:

> "If defendants can be held liable at all under the facts in this case, it can only be on the theory that they are joint tort feasors with Griffin and the only question that remains necessary to be considered is whether the accord and satisfaction by the joint tort feasor Griffin operated to discharge these defendants also."

It was held that it did. The accord and satisfaction occurred through the settlement of another suit brought by plaintiff against Griffin.

In an action against several persons for a joint trespass and an injury to plaintiff, if he receive money in satisfaction of the wrong done to him by the party paying him, it is satisfaction as to all the defendants and they are thereby discharged of all liability to plaintiff whether the parties designed it or not.

Brown vs. *Kenchelos,* 3 Cold (Tenn.), 192.

The intention of the parties is to be arrived at, and if it appears that the consideration for the release was not accepted by the releasor in full settlement of his claim the other tort feasors are discharged merely *pro tanto.*

Bell v. *Perry,* 43 Ia., 368;
Meixell v. *Kirkpatrick,* 29 Kan., 684;
McCrillis v. *Hawes,* 38 Me., 568;
Irvine v. *Milbank,* 15 Abb. Pr., N. S., 378;
Matthews v. *Chicopee Mfg. Co.,* 3 Robt. (N. Y.), 711;
Sloan v. *Herrick,* 49 Vt., 328;
Bloss v. *Plymale,* 3 W. Va., 393;
Pogel v. *Meilke,* 60 Wis., 250;
Snyder v. *Mutual Telephone Co.,* 135 Ia., 215;
Bailey v. *Delta Elect. L. Co.,* 86 Miss., 634.

In *Knox* v. *Work, Browne* (Pa.), 101, it was held that:

"If there be neither a recovery against one of the trespassers, nor a release to one of them, and it

be a matter of doubt whether plaintiff has settled with one of them it should be left like every other fact to the jury."

Acceptance of a partial satisfaction from one joint tort feasor is a *pro tanto* discharge of the others.

Knapp v. *Roche,* 94 N. Y., 329;
Chamberlin v. *Murphy,* 41 Vt., 110.

The amount paid by the tort feasor released is to be deducted from the total amount of the plaintiff's damages in determining the amount of the liability of the other *tort feasors.*

Judd v. *Walker,* 158 Mo. App., 156;
Gretjens v. *N. Y.,* 145 App. Div., 640;
St. Louis R. Co. v. *Bass,* 140 S. W., 860;
Button v. *Louisville,* 118 S. W., 977;
Musolf v. *Duluth,* 108 Minn., 369, 24 L. R. A. N. S., 451.

In *Heyer* v. *Carr,* 6 R. I., 45, the action was trover against two for a joint conversion. The plaintiffs obtained judgment against one and then withdrew their action against the other upon receiving from him partial satisfaction for the wrong and agreeing no further to prosecute him therefor. *Held,* that damages might be assessed against the defaulted defendant for the value of the goods converted, with interest from the time of conversion, *deducting therefrom the amount re-*

ceived from his co-defendant, by way of compromise for his liability.

From the foregoing considerations we respectfully submit that the decree should be affirmed as to the matters presented on this cross appeal.

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